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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VICTOR S., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and ALEXANDRA B., Appellees.	2 CA-JV 2008-0039 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17760100

Honorable Jane L. Eikleberry, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 Victor S. appeals from the juvenile court's order of April 17, 2008, terminating his parental rights to his biological daughter, Alexandra B., on grounds of neglect, *see* A.R.S. § 8-533(B)(2); mental illness or deficiency, *see* § 8-533(B)(3); and both nine- and fifteen-month out-of-home placement, *see* § 8-533(B)(8)(a) and (b). On appeal, Victor contends the juvenile court committed fundamental error and abused its discretion in finding clear and convincing evidence supporting any of the statutory grounds alleged, by finding termination of Victor's rights was in Alexandra's best interests, and by failing to make specific, written factual findings in support of its termination order.

¶2 Viewed in the light most favorable to upholding the juvenile court's ruling, *see In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994), the essential facts are these. Alexandra was born in March 2006 to her developmentally delayed, twenty-year-old mother, Sarina B. Alexandra's father, Victor S., is Sarina's maternal uncle by marriage: Victor's wife Trissia is the sister of Sarina's mother, Kathy B. Within days of Alexandra's birth, Kathy filed a private dependency petition, alleging that Sarina's developmental delays rendered her unable to parent Alexandra and, further, that Sarina's incapacity had rendered her unable to consent to sexual contact with her uncle.[1]

¶3 Interviewed in March 2006 by Mindy Flannery, an investigator for Child Protective Services (CPS), Sarina reported then that Victor's advances toward her had begun in California when she was approximately thirteen years old and that "sexual things [had]

[1]Kathy had also initiated guardianship proceedings in Pima County and was appointed Sarina's temporary legal guardian four days before Alexandra was born.

happened with Victor on many occasions." Flannery also learned of a report by California CPS authorities substantiating that Victor had sexually abused Sarina when she was fourteen years old. Sarina had reported then that Victor had intercourse with her on at least four occasions and that other sexual contact had also occurred. But, by the time psychologist Karen Paulsen-Balch evaluated Sarina in Arizona in August 2006, Sarina was claiming she had not had intercourse with Victor until she was nineteen years old and had been a willing participant.

¶4 In April 2006, these events occurred: the juvenile court substituted the Arizona Department of Economic Security (ADES) as petitioner in the dependency action Kathy had filed; genetic testing confirmed Victor's paternity; and the juvenile court ratified the order first entered in the guardianship proceeding that Sarina and Alexandra have no contact with either Victor or Trissia. In May, Alexandra was adjudicated dependent by stipulation of the parties, and the court approved her continued in-home placement with Kathy and Sarina, subject to the no-contact order.

¶5 The stated goal of the initial case plan was family reunification.[2] Sarina, Kathy, Victor, and Trissia were each assigned certain tasks and offered various services under the case plan. After repeated reports that Victor and Trissia were continuing to have unauthorized contact with Sarina and Alexandra, however, in January 2007 Alexandra was

[2]Although the case plan did not expressly define the term, the "reunification" ADES contemplated appears to have been primarily between Alexandra and her mother, if Sarina could demonstrate enough progress to become able to parent Alexandra independently.

removed from Kathy's custody and placed in a foster home.[3] At a permanency hearing in January 2008, the juvenile court determined severance and adoption to be the best permanent plan for Alexandra and ordered ADES to file a motion to terminate both parents' rights. After a four-day contested severance hearing in April 2007, the court found that clear and convincing evidence supported the termination of Victor's rights on each of the four statutory grounds alleged in the motion to terminate. He then brought this timely appeal.

¶6 We address Victor's final contention first. He asserts the form of the juvenile court's signed order constitutes fundamental error because it does not comply with the specificity requirements of A.R.S. § 8-538(A); Rule 66(F)(2)(a), Ariz. R. P. Juv. Ct.; and Rule 54(a), Ariz. R. Civ. P.[4] Section 8-538(A) provides that every order terminating parental rights "shall be in writing and shall recite the findings on which the order is based, including findings pertaining to placement of the child and the court's jurisdiction." Rule 66, governing termination adjudication hearings, provides in subsection (F) that all findings and orders must be in the form of a written, signed minute entry or order. If the court is

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[3]Kathy died during the pendency of these proceedings, in December 2007. Sarina is reportedly now living in California, and her separate appeal from the termination order was dismissed after appointed counsel could find no meritorious issue to raise on appeal.

[4]Rule 54(a), Ariz. R. Civ. P., defining the term judgment for purposes of civil proceedings, provides: "A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings." But Victor has cited no authority suggesting Rule 54(a) is applicable to the final order in a juvenile proceeding, nor has he explained the rule's significance in this case, even if it did apply. We therefore do not address his contention that the juvenile court's order violated Rule 54(a). *See generally* Ariz. R. Civ. App. P. 13(a)(6) (appellate argument must contain appellant's contentions with respect to issues presented, reasons for contentions, and citations of authority); Ariz. R. P. Juv. Ct. 91(A) (Rule 13, Ariz. R. Civ. App. P. applicable to appeals in juvenile proceedings).

granting a request to terminate a parent's rights, subsection (F)(2)(a) further requires the court to "[m]ake specific findings of fact in support of the termination . . . ."

¶7 The juvenile court's signed minute entry falls considerably short of compliance with § 8-538(A) and Rule 66(F)(2)(a). It articulates this single factual finding: "Based upon the evidence, including the testimony of Sarina B[.], the Court finds that the testimony of Sarina B[.] that her uncle, Victor S[.], did not sexually molest her before she was eighteen years old to be not credible." The court did not otherwise specify any facts on which it based its conclusions that ADES had presented clear and convincing evidence establishing all four statutory grounds alleged for termination.

¶8 Nonetheless, because Victor did not raise the issue below when the juvenile court could have amplified its findings, he has waived the issue for appeal. As stated in *Christy C. v. Arizona Department of Economic Security*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007):

> We generally do not consider objections raised for the first time on appeal. This is particularly so as it relates to the alleged lack of detail in the juvenile court's findings. . . . [A] party may not "sit back and not call the trial court's attention to the lack of a specific finding on a critical issue, and then urge on appeal th[e] mere lack of a finding on that critical issue as a ground[] for reversal." Thus, this argument has been waived.

Id., *quoting Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App. 265, 271, 547 P.2d 1065, 1071 (1976) (citations omitted). The court further noted that, even had the juvenile court's findings been insufficient, "any error would have been harmless, and remand not required." *Christy C.*, 214 Ariz. 445, n.5, 153 P.3d at 1081 n.5. We reach the same conclusion here.

¶9 We turn next to Victor's claim that it was fundamental error and an abuse of the juvenile court's discretion to find ADES had proven any of the four grounds alleged for severance. As ADES observes, Victor's contention is more properly viewed as a challenge to the sufficiency of the evidence supporting those statutory grounds. On review, we will not disturb the court's order unless there is no reasonable evidence to support the findings on which its conclusions are based. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998).

¶10 Victor contends the record does not support either neglect, § 8-533(B)(2), or mental deficiency, § 8-533(B)(3), as a basis for terminating his rights. ADES concedes in its answering brief that no reasonable evidence supported the court's finding on the latter ground. We agree. With respect to § 8-533(B)(2),[5] ADES devotes eleven paragraphs of its brief to its argument that severance was justified under that subsection because the evidence that Victor had sexually abused Sarina when she was a minor established he had "wilfully abused a child" for purposes of subsection (B)(2). There was indeed reasonable evidence to support such a conclusion; unfortunately, that was not the conclusion the juvenile court reached nor the position ADES advocated in closing argument.[6]

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[5]Section 8-533(B)(2) recognizes as a ground for terminating parental rights "[t]hat the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child."

[6]The motion for termination ambiguously refers twice to the (B)(2) ground as "Neglect," yet in stating the specific facts allegedly constituting neglect refers to "abuse" as well as neglect.

¶11 In closing, counsel for ADES argued not abuse but neglect as the basis for severance under § 8-533(B)(2), stating: "As to the father, we alleged the ground of neglect. In his situation, the ground of neglect is based upon ignoring a really bad situation in procreating with the niece of his wife, knowing that that was not a proper relationship." In turn, the court in its ruling cited neglect, not abuse, as the legal ground justifying severance pursuant to § 8-533(B)(2). Yet no evidence was presented that Victor had neglected Alexandra as that term is defined in A.R.S. § 8-201(21): "'Neglect' or 'neglected' means the inability or unwillingness of a parent . . . of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes substantial risk of harm to the child's health or welfare . . . ." There was simply no issue in this case of Victor's failing to provide Alexandra with "supervision, food, clothing, shelter or medical care."

¶12 The third statutory ground, nine-month out-of-home placement pursuant to § 8-533(B)(8)(a), also was not established by the evidence. To warrant severance on that ground, ADES was required to show, *inter alia*, that Victor had "substantially neglected or wilfully refused to remedy the circumstances that cause[d] [Alexandra] to be in an out-of-home placement." § 8-533(B)(8)(a). Because Victor did participate in the services ADES offered him under the case plan and, in fact, was found on several occasions to be in full compliance with the case plan, the record does not permit a finding that Victor had "substantially neglected or wilfully refused to remedy the circumstances" causing Alexandra's out-of-home placement. *See Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, ¶ 30, 152 P.3d 1209, 1214 (App. 2007) ("Under A.R.S. § 8-533(B)(8)(a), 'parents who

make appreciable, good faith efforts to comply with remedial programs outlined by ADES will not be found to have substantially neglected to remedy the circumstances that caused the out-of-home placement, even if they cannot completely overcome their difficulties [within the time specified by statute.]'"), *quoting In re Maricopa County Juv. Action No. JS-501568*, 177 Ariz. 571, 576, 869 P.2d 1224, 1229 (App. 1994).

¶13 The fourth and final ground on which the juvenile court ordered Victor's rights terminated was fifteen-month out-of-home placement pursuant to § 8-533(B)(8)(b). Victor's contention regarding this ground is that ADES failed to offer him appropriate reunification services or "time to demonstrate his ability to parent as a result of being provided with appropriate services."

¶14 ADES is required to "ma[k]e a diligent effort to provide appropriate reunification services." § 8-533(B)(8); *see also Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 32, 971 P.2d 1046, 1053 (App. 1999).

> Although CPS need not provide "every conceivable service," it must provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child. The State does not provide such opportunity or make a "concerted effort to preserve" the parent-child relationship when it neglects to offer the very services that its consulting expert recommends.

Id. ¶ 37, *quoting In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994).

¶15 Here, ADES referred Victor to Dr. Sergio Martinez, who performed a psychosexual evaluation and recommended initially that Victor and his wife be allowed supervised visitation with Alexandra and receive "short-term marital counseling" to address

any unresolved relationship issues stemming from "Victor's affair with Sarina." In an addendum to his initial report, Martinez explained that he had been provided insufficient information to support a diagnosis of pedophilia but opined that the sexual relationship between Victor and Sarina, in which Victor's wife and Sarina's mother were to some degree complicit, illustrated "extremely poor boundaries" among the family members. Martinez concluded that "the reported family dynamics would suggest that a pattern of tension, exploitation, conflict, and dysfunction is likely to continue to exist [among] these family members that could ultimately have an adverse psychological impact upon Alexandra's emotional and social development."

¶16 At a dependency review hearing in October 2006, the juvenile court ordered that Martinez's recommendations be implemented and that Victor and his wife attend parenting classes. At subsequent review hearings and the permanency planning hearing in January 2008, the court found repeatedly that ADES was making reasonable efforts to facilitate family reunification. Victor has directed us to no place in the record where he objected to the court's reasonable-efforts findings, and the only further service he appears to have requested at any point was additional visitation, which the court permitted ADES to grant in its discretion. Even on appeal, Victor argues that "[n]o appropriate services were provided [him]" without specifying what additional services he believes he should have had.

¶17 The assigned case manager, Margaret Sierras, is a member of an "ongoing unit" within CPS specially trained to handle cases involving sexual abuse. Sierras testified that, although Victor had performed the various tasks assigned him under the case plan, ADES

concluded he had not benefitted sufficiently as a result. First, there was concern that he and his wife had repeatedly violated the order prohibiting them from having contact with Sarina and Alexandra. Second, despite Dr. Martinez's original opinion that Victor posed a low risk of reoffending, ADES still considered Victor a potential safety threat to Alexandra, based on several factors: the substantiated CPS report from California that he had molested Sarina when she was a minor, his denial that any sexual contact had occurred before she was eighteen, his lack of any remorse about having impregnated his mentally retarded niece, and his continuing violation of the court's order to avoid contact with Sarina and Alexandra. Sierras further testified she had not referred Victor for sex-offender therapy because of his persistent denial of contact with Sarina when she was a minor. As Sierras stated, "[G]enerally speaking, you have to admit to what you did for treatment to be effective."

¶18 In sum, ADES had offered Victor all of the services recommended by its expert, Dr. Martinez, *see Mary Ellen C.*, 193 Ariz. 185, ¶ 37, 971 P.2d at 1053, and was not obligated to "undertake rehabilitative measures that are futile," *id.* ¶ 34. *See also In re Maricopa County Juv. Action Nos. JS-5209 & JS-4963*, 143 Ariz. 178, 189, 692 P.2d 1027, 1038 (App. 1984). The record contains reasonable evidence to support the juvenile court's conclusion that ADES had made diligent efforts to provide appropriate reunification services to Victor and this family under the unusual circumstances they presented.

¶19 We thus conclude the evidence was sufficient to sustain the juvenile court's order severing Victor's rights under § 8-533(B)(8)(b).[7] Proof of any one of the statutory

[7]Section 8-533(B)(8)(b) additionally requires proof by clear and convincing evidence that Alexandra had been cared for in a court-ordered, out-of-home placement for fifteen

grounds enumerated in § 8-533(B) will support the termination of parental rights, *see* A.R.S. § 8-863(B) (court may terminate parental rights upon clear and convincing proof of at least one statutory ground specified in § 8-533); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000), provided a preponderance of the evidence establishes that severing the parent's rights will serve the child's best interests, *see* § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005).

¶20 Finally, we address the juvenile court's required finding that terminating Victor's rights was in Alexandra's best interests. He contends that, without his having received "the proper services to support [his] relationship" with Alexandra, it was premature for ADES to argue—and, implicitly, for the court to find—that he could not parent Alexandra at least as well as "a foster home could provide for [her]." In considering his contention, we look only to determine if there is reasonable evidence in the record to support the juvenile court's findings. We will not disturb its ruling unless there is no evidence to support its findings or it has reached an erroneous legal conclusion. *See Audra T.*, 194 Ariz. 376, ¶ 2, 982 P.2d at 1291.

¶21 To prove that severing Victor's rights would serve Alexandra's best interests, ADES could show either "an affirmative benefit to the child by removal or a detriment to the child by continuing in the relationship." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189

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months or more; that Victor had been unable to remedy the circumstances that caused her to be placed out-of-home; and that there is a substantial likelihood that he would not be able to exercise "proper and effective parental care and control in the near future." *Id.* Because Victor has not specifically challenged the sufficiency of the evidence as to any of these other components of § 8-533(B)(8)(b), we do not address them.

Ariz. 553, 557, 944 P.2d 68, 72 (App. 1997). Freeing a child for adoption when a current adoptive placement exists is one example of a benefit to the child conferred by severance. *See In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 734 (1990); *In re Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 243, 756 P.2d 335, 340 (App. 1988).

¶22 Although the juvenile court again did not articulate its reasons for finding that a preponderance of the evidence established that Alexandra's best interests would be served by terminating Victor's parental rights, the record does support that conclusion. After Alexandra was removed from her grandmother's care in January 2007, she was placed in a licensed foster home where all of her needs were being met. She had "made a lot of progress," and she was "doing extremely well." The case manager testified that the "whole [foster] family" had "formed a bond" with Alexandra and the foster mother "would very much like" to adopt her should her parents' rights be severed. Reasonable evidence thus supports the court's best-interests finding, and we will not disturb it.

¶23 For the reasons stated herein, the juvenile court's order of April 17, 2008, terminating Victor's parental rights to Alexandra is affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge